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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

FERDINAND LADERA,

Plaintiff,

v.

LITB, Inc., d/b/a LIGHT IN THE
BOX,

Defendant.

Case No. 2:22-cv-00221-SAB

**DEFENDANT'S OPPOSITION
TO PLAINTIFF LADERA'S
MOTION TO STRIKE
AFFIRMATIVE DEFENSES IN
DEFENDANT'S ANSWER**

3/14/2023

With Oral Argument: 10:30 a.m.

Video Conference

1 **INTRODUCTION**

2 Defendant LITB, Inc. (“Defendant”) hereby submits its opposition to the
3 motion by Plaintiff Ferdinand Ladera (“Plaintiff”) to strike all but one of
4 Defendant’s affirmative defenses. Plaintiff’s motion should be denied because
5 Defendant’s affirmative defenses provide Plaintiff with fair notice, and Plaintiff
6 has not made any showing of prejudice. Alternatively, Defendant requests leave to
7 amend its Answer.

8 **BACKGROUND**

9 This case involves a work of digital art identified by Plaintiff as “Dim Light”
10 (the “Work”). (*See* ECF No. 1 at ¶ 11.) Plaintiff alleges that Defendant copied the
11 Work and created wall tapestries bearing derivatives of the Work. (*See* ECF No. 1
12 at ¶ 16.) Plaintiff claims to have discovered such unauthorized use on or about
13 July 1, 2022. (*See* ECF No. 1 at ¶ 17.) Plaintiff claims to have then notified
14 Defendant of the allegedly infringing use on August 24, 2022, but that the parties
15 were unable to resolve the matter. (*See* ECF No. 1 at ¶ 24.)

16 On October 5, 2022, Plaintiff filed his complaint for alleged copyright
17 infringement. Defendant was served on October 13, 2022, and counsel for the
18 parties agreed to extend Defendant’s deadline to respond to December 1, 2022. On
19 December 1, 2022, Defendant filed its Answer, denying most of Plaintiff’s
20 allegations. Most importantly, Defendant denied that it operates the
21 lightinthebox.com website (the “Website”). (*See* ECF No. 7 at ¶ 7.)

22 This is key, because all of the alleged infringement that Plaintiff claims
23 occurred in this case took place on the Website. There is no infringement that
24 allegedly occurred except on the Website, and Plaintiff has not alleged any theory
25 of liability against Defendant apart from its alleged infringing sale on the Website.
26 In its Answer, Defendant has asserted 17 affirmative defenses. Plaintiff moved to
27 strike all but one.

ARGUMENT

A. Motions to strike affirmative defenses are generally disfavored.

Rule 8 of the Federal Rules of Civil Procedure requires a Defendant to set forth its affirmative defenses as part of its answer in “short and plain terms.” Fed. R. Civ. P. Rule 8(b)(1)(a). A court has discretion to strike such affirmative defenses if they are insufficient, “redundant, impertinent, or scandalous.” Fed. R. Civ. P. Rule 12(f). An affirmative defense is sufficient if “it gives plaintiff fair notice of the defense.” *Simmons v. Navajo Cty.*, 609 F.3d 1011, 1023 (9th Cir. 2010), (overruled on other grounds as recognized by *Morris v. California*, 2022 WL 2901730 (July 22, 2022)). And “the ‘fair notice’ required by the pleadings standard only requires describing the defense in ‘general terms.’” *Kohler v. Flava Enters., Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2015) (quoting 5 Wright & Miller, *Fed. Prac. & Proc.* §1274 (3d ed. 1998)).

Accordingly, motions to strike affirmative defenses are “regarded with disfavor because [they] are often used as delaying tactics, and because of the limited importance of pleadings in federal practice.” *McElmurry v. Ingebritson*, 2017 WL 9486190, at *1 (E.D. Wash. Aug. 14, 2017) (quoting 5 Wright & Miller, *Fed. Prac. and Proc.* §1381). In particular, motions to strike a defense as insufficient are often disfavored for their “often harassing character.” *Equal Employment Opportunity Commission v. Telecare Mental Health Servs. of Washington, Inc.*, 2022 WL 898551 at *1 (W.D. Wash. Mar. 28, 2022). Courts generally deny such motions “unless the moving party shows ‘there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed.’” *McElmurry*, 2017 WL 9486190, at *1 (quoting *Kerzman v. NCH Corp.*, 2007 WL 765202, at *6 (W.D. Wash. Mar. 9, 2007)). Indeed, even when such a showing has been made, courts in the Ninth Circuit still will generally deny a motion to strike absent a showing of

prejudice by the moving party. *See, e.g., Telecare Mental Health, Inc.*, 2022 WL 898551 at *3 (“[Plaintiff] has failed to demonstrate that striking this defense is necessary to avoid prejudice or indeed, would serve much purpose at all.”); *Nestle USA Inc. v. Crest Foods, Inc.*, 2017 WL 3267665 at *22 (C.D. Cal. July 28, 2017) (“[C]ourts often require a showing of prejudice by the moving party as a condition to granting such relief.”) (internal quotation marks omitted); *Russell Road Food & Beverage, LLC v. Galam*, 2013 WL 6684631, at *2 (D. Nev. Dec. 17, 2013) (“Plaintiff fails to show as a threshold matter that any prejudice will come from allowing the defenses to stand until the parties complete discovery.”). While a general requirement for fair notice is that the pleading party state the nature and grounds for an affirmative defense, an affirmative defense is only insufficient if it lacks merit “under any set of facts the defendant might allege.” *See Kohler v. Staples the Off. Superstore, LLC*, 291 F.R.D. 464, 468 (S.D. Cal. 2013) (quoting *McArdle v. AT & T Mobility LLC*, 657 F. Supp. 2d 1140, 1149–50 (N.D. Cal. 2009)).

Finally, motions to strike affirmative defenses are disfavored “because of the strong policy favoring resolution on the merits.” *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010) (a motion to strike a proper affirmative defense should not be granted unless it appears to a certainty that a plaintiff would succeed despite any state of facts that could be proved in support of an affirmative defense); *see also Jernee v. Kennametal, Inc.*, No. 60653, 2015 WL 134767, at *6 (Nev. Jan. 8, 2015) (motions to strike responsive pleadings are contrary to policy favoring adjudication on the merits); *Stanbury Law Firm v. I.R.S.*, 221 F.3d 1059, 1063 (8th Cir. 2000) (striking a pleading is an extreme measure and drastic remedy, viewed with disfavor, and infrequently granted).

1 **B. Plaintiff’s motion should be denied as to Defendant’s third,**
 2 **fourth, fifth, seventh, eighth, tenth, twelfth, thirteenth, and**
 3 **sixteenth affirmative defenses, because Defendant has provided**
 4 **sufficient information to provide Plaintiff with notice of the legal**
 5 **theories and general basis of these defenses, factual specificity is**
 6 **not required, and Plaintiff has failed to show how he will be**
 7 **prejudiced by these affirmative defenses.**

8 Most courts to consider the issue in the Ninth Circuit agree that a defendant
 9 asserting an affirmative defense is not required to meet the same pleading
 10 standards required of plaintiffs under either *Ashcroft v. Iqbal*, 556 U.S. 662, 677–
 11 79 (2009) or *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As the court in
 12 *McElmurry* noted, courts in this circuit “have even held that boilerplate affirmative
 13 defenses are appropriate prior to discovery.” 2011 WL 9486190, at *2. This is due
 14 to a distinction in the language between Rules 8(a) and 8(c), upon which the Court
 15 relied in deciding *Iqbal* and *Twombly*: “An ‘affirmative statement’ need not
 16 contain facts making the defense plausible, as under *Iqbal*, because Rule 8(c) does
 17 not require a ‘showing,’ as does Rule 8(a), but an affirmative defense must at least
 18 fairly identify the legal theory upon which it rests.” *Rockwell Automation, Inc. v.*
 19 *Beckhoff Automation, LLC*, 23 F.Supp.3d 1236, 1241–42 (D. Nev. 2014) (quoting
 20 *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F.Supp.2d 893, 900 (E. D. Pa. 2011)).

21 Although the Ninth Circuit has not itself expressly ruled on the issue of
 22 whether the *Iqbal* and *Twombly* standard applies to affirmative defense pleading, it
 23 has continued to recognize the “fair notice” standard articulated in *Wyshak v. City*
 24 *Nat. Bank*, 607 F.2d 824 (9th Cir. 1979) in the time since those cases were decided,
 25 impliedly continuing the more lenient standard for affirmative defenses. *See, e.g.,*
 26 *Kohler*, 779 F.3d at 1019. It is sufficient under this standard, in other words, to
 27 describe “the defense in general terms.” *Id.*

1 Plaintiff's arguments as to Defendant's third, fourth, fifth, seventh, eighth,
2 tenth, twelfth, thirteenth, and sixteenth affirmative defenses all contend that
3 Defendant has failed to meet its pleading standard. In each case, however, Plaintiff
4 seeks factual pleading, or particularity, that is more akin to *Iqbal*-style pleading—
5 and far beyond that required for affirmative defenses. For example, with respect to
6 Defendant's third affirmative defense (fair use), Plaintiff argues Defendant was
7 required to describe how any alleged use of Plaintiff's purported works constituted
8 fair use. But that is not what the law requires. In *Reiffer v. HGM Holdings LLC*, the
9 court considered a case wherein the defendant had failed to allege a single fact in
10 support of its fair use copyright defense. 2019 WL 1455325, at *3 (E.D. Cal. Apr.
11 2, 2019). In denying the motion to strike, the court noted the lack of prejudice to
12 the plaintiff that would result from allowing the affirmative defense to proceed: "It
13 is not clear what extraneous issues Plaintiff will be forced to litigate as a result of
14 these defenses that may be relevant to the copyright infringement claim." *Id.* at *4.
15 The court also cited *S.E.C. v. Sands*, 902 F.Supp. 1149, 1166 (C.D. Cal. 1995),
16 *aff'd sub nom. S.E.C. v. First. Pac. Bancorp.*, 142 F.3d 1186 (9th Cir. 1998), for
17 the supposition that, "[e]ven when the defense under attack presents a purely legal
18 question, courts are reluctant to determine disputed or substantial questions of law
19 on a motion to strike."

20 The same is true here. At this early stage in the proceeding, Defendant has
21 provided Plaintiff with information sufficient to understand that it will assert this
22 defense. Moreover, there is no prejudice to Plaintiff, and no extraneous discovery
23 that would not have arisen under Plaintiff's case in chief. Thus, to the extent
24 Plaintiff seeks to strike Defendant's affirmative defenses for lack of sufficiency,
25 these arguments fail, and Plaintiff's motion should be denied.

26 In moving to strike Defendant's first, second, third, sixth, eleventh,
27

fourteenth, fifteenth, and seventeenth affirmative defenses,¹ Plaintiff continues to assert that these are insufficient. Defendant likewise contends these are adequate to put Plaintiff on notice and that Plaintiff is not prejudiced by Defendant's assertion of these defenses. However, additionally, Plaintiff raises additional arguments with respect to each of these defenses, which Defendant will address in turn below.

C. Plaintiff's motion should be denied as to Defendant's first, second, and seventeenth affirmative defenses, because Defendant was not required to raise these in a motion to dismiss, as Plaintiff argues.

With respect to Defendant's first affirmative defense, Defendant has sufficiently put Plaintiff on notice of its argument that Plaintiff has failed to assert a claim for which relief can be granted. In addition to arguing insufficiency, Plaintiff argues that Defendant was required to raise this defense (if at all) by asserting it in a motion to dismiss. However, this is not the case. Rule 12(b)(h) clarifies that a party may waive a defense listed in Rule 12(b)(2)-(5) by failing to raise it in its first responsive pleading. However, Defendant's Answer is its first responsive pleading; moreover, a plaintiff's failure to state a claim is a defense raised under Rule 12(b)(6). Similarly, Plaintiff argues that Defendant was required to bring its second affirmative defense (for lack of standing) in a motion to dismiss; however, lack of standing is also not among the specifically enumerated defenses identified by Rule 12(b)(h), nor is it one required to be brought under a

¹ Notably, and inexplicably, Plaintiff has elected not to contest *only* Defendant's ninth affirmative defense, which reads: "Plaintiff's rights, if any, to actual damages and/or profits under 17 U.S.C. § 504 are limited by expenses and the elements of profit attributable to factors other than the Copyright." This affirmative defense provides roughly the same degree of specificity of all the others; yet Plaintiff makes no claim that the ninth affirmative defense leaves him without fair notice.

1 motion to dismiss. For these reasons, Defendant's first and second affirmative
2 defenses should be allowed to go forward.

3 Defendant's seventeenth affirmative defense, for lack of personal
4 jurisdiction, *does* raise one of the specifically enumerated defenses; it is, therefore,
5 one of the defenses that must be raised by a Defendant *either* by motion or in the
6 Defendant's first responsive pleading. As the Ninth Circuit recently confirmed:
7 "The Rules do not require that threshold defenses always be pled by motion.
8 Rather, Rules 12(b) and 12(h) provide that a defendant must assert its defense,
9 absent a pre-answer motion, in a responsive pleading if one is required and that it
10 may choose to assert a defense by answer without risking forfeiture of that
11 defense." *Argonaut Ins. Co. v. St. Francis Med. Ctr.*, 17 F.4th 1276, 1281 (9th Cir.
12 2021).²

13 **D. Plaintiff's motion should be denied as to Defendant's sixth and**
14 **eleventh affirmative defenses because these defenses directly**
15 **pertain to Plaintiff's claim regarding alleged liability arising from**
16 **operation of the Website.**

17 With respect to Defendant's sixth and eleventh affirmative defenses,
18 Plaintiff misconceives these defenses as assertions of comparative fault for
19 negligence. These defenses, however, are directly applicable to the allegations in
20

21 ² Defendant raised this defense via Answer, rather than by motion to dismiss,
22 because of the significant administrative costs associated with litigating this issue
23 in four separate, nearly identical matters simultaneously. Its forthcoming motion to
24 consolidate the four cases will hopefully allow Defendant to address this burden so
25 that the defense can be addressed and timely briefed. In filing this opposition,
26 Defendant expressly preserves its argument that jurisdiction is not proper in this
27 Court.

1 Plaintiff's complaint. Defendant is not asserting through its sixth and eleventh
 2 affirmative defenses that other parties are at fault in the abstract. Instead—and
 3 consistent with Defendant's responsive pleading—these defenses echo Defendant's
 4 specific and unequivocal denial that it operates the Website. (*See* ECF No. 7 at
 5 ¶ 8). Plaintiff is on sufficient notice of this defense.

6 Should the Court adopt Plaintiff's position that these defenses are negative
 7 defenses and not affirmative defenses, however, Defendant requests that the Court
 8 “make[] clear that Defendant[] [is] not precluded from arguing, in a motion or at
 9 trial” that Plaintiff has failed to state a claim or lacks standing. *See Hernandez v.*
 10 *Dutch Goose, Inc.*, 2013 WL 5781476, at *7 (N.D. Cal. Oct. 25, 2013).

11 **E. Defendant requests leave to amend should any affirmative**
 12 **defenses be stricken.**

13 Leave to amend a pleading shall be freely given “when justice so requires.”
 14 Fed. R. Civ. P. Rule 15(a)(2). In the context of affirmative defenses, federal courts
 15 have consistently found that amendment is appropriate where the other party is not
 16 prejudiced. If a claim is stricken, leave to amend should be freely given when
 17 doing so would not cause prejudice to the opposing party. *See Wyshak v. City Nat'l*
 18 *Bank*, 607 F.2d 824, 826 (9th Cir. 1979) (if an affirmative defense is stricken for
 19 failure to give sufficient notice, the court should grant the defendant leave to
 20 amend its answer). If this Court is inclined to grant Plaintiff's motion in any part,
 21 Defendant requests leave of Court to amend its Answer to cure any identified
 22 defects.

23 Defendant further requests that the Court's ruling reflect that it has preserved
 24 its arguments regarding personal jurisdiction.

25 **CONCLUSION**

26 For all the foregoing reasons, Defendant respectfully requests that the Court
 27 deny Plaintiff's motion because Defendant was not required to raise any of these

1 arguments via motion to dismiss, and appropriately asserted them in its responsive
2 pleading. Alternatively, Defendant requests leave to amend its answer for any
3 defenses for which the Court grants Plaintiff's motion. And finally, Defendant
4 requests that the Court's ruling reflect that Defendant has preserved its arguments
5 regarding personal jurisdiction.

6 Dated this 12th day of January, 2023. Respectfully submitted,

7 FOCAL PLLC

8 By: s/ Stacia N. Lay

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (“NEF”) to all parties in the case, all of whom are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

Dated: January 12, 2023

s/ Stacia N. Lay

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